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In The

Supreme Court of the United States

October Term, 1995

ST. PAUL MERCURY INSURANCE COMPANY AND NORTH AMERICAN CONSTRUCTION CORPORATION,

Petitioners,

v.

UNITED STATES FOR THE USE OF B&D MECHANICAL CONTRACTORS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KURT M. RUPERT, OBA #11982
Counsel of Record
KENT F. FRATES
HARTZOG CONGER & CASON
1600 Bank of Oklahoma Plaza
201 Robert S. Kerr
Oklahoma City, Oklahoma 73102
(405) 235-7000
FAX: (405) 235-7329

Attorneys for Respondent B&D Mechanical Contractors, Inc.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

North American Construction Corporation ("North American") was the prime contractor for the installation of a groundwater treatment system at Tinker Air Force Base in Midwest City, Oklahoma (the "Project"). St. Paul Mercury Insurance Company ("St. Paul") furnished the payment bond to North American for the Project as required by 40 U.S.C. § 270a of the Miller Act. North American entered into a subcontract (the "Subcontract") with B&D Mechanical Contractors, Inc. ("B&D") to provide labor and services relative to the installation of a portion of the Project. B&D completed its work on the Project, but was not paid for $161,922.78 of the labor and services it provided. As a result, B&D sued North American and St. Paul under the Miller Act, 40 U.S.C. § 270a-c, in the United States District Court for the Western District of Oklahoma, the judicial district in which the Project is located.

Relying on a forum selection clause contained in the Subcontract, North American and B&D moved to dismiss B&D's Complaint for improper venue (App. 23). The District Court granted the motion of North American and St. Paul to dismiss, enforcing the forum selection clause contained in the Subcontract (App. 20).

The United States Court of Appeals for the Tenth Circuit reversed the decision of the District Court, and remanded the case for trial in the United States District

Court for the Western District of Oklahoma. In its opinion, the Tenth Circuit Court of Appeals adopted an argument advanced by St. Paul and North American, ruling that § 270b(b) of the Miller Act, requiring that suits be brought in the judicial district where the contract was performed "not elsewhere", is subject to contractual waiver by a valid forum selection clause. The Tenth Circuit Court of Appeals held, however, that the forum selection clause contained in the Subcontract was invalid because it purported to limit B&D to pursuing claims only in state court in Texas.[1] The Tenth Circuit Court of Appeals held that this limitation was fatal to the clause's enforceability because federal courts have exclusive jurisdiction over Miller Act claims.

The Tenth Circuit Court of Appeals held that although parties are permitted to contractually alter the Miller Act's venue provision, they cannot change its jurisdictional requirements. Moveover, the Tenth Circuit Court of Appeals refused to rewrite the forum selection clause contained in the Subcontract to provide for the transfer of the case to the Western District of Texas as an alternate forum as suggested by St. Paul and North American. The Tenth Circuit Court of Appeals concluded that the forum selection clause contained in the Subcontract, which attempted to divest the federal courts of their exclusive jurisdiction to adjudicate claims arising

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[1] St. Paul and North American interpreted the forum selection clause at issue in this case as limiting B&D to prosecuting a case in "a state court forum only". Accordingly, this was the construction of the forum selection clause actually advocated by St. Paul and North American.

under the Miller Act, was void and unenforceable. The Tenth Circuit therefore remanded the case to the United States District Court for the Western District of Oklahoma for trial (App. 6-7).

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN *RICH*

The arguments advanced by St. Paul and North American confuse established precedent holding that federal courts have exclusive jurisdiction to adjudicate Miller Act claims, with cases holding that the parties to a Miller Act claim have the ability to direct where such claims may properly be maintained. In essence, the argument of St. Paul and North American is that because the parties to a Miller Act claim can contractually agree to litigate their disputes in a federal forum different than that specified by § 270b(b) of the Miller Act, numerous state and federal cases holding that federal courts have exclusive jurisdiction over Miller Act claims are wrongly decided. In advancing this argument, St. Paul and North American ask no less than that this Court overturn over 30 years of precedent consistently holding that federal courts have exclusive jurisdiction over Miller Act claims simply because North American did a poor job of drafting the forum selection clause at issue in this case. St. Paul and North American arrive at the "conflict" they ask

this Court to resolve by confusing the distinct concepts of venue and exclusive federal jurisdiction over Miller Act claims, and by overstating the scope of this Court's holding in *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116 (1974).

Throughout their Brief, St. Paul and North American repeatedly contend that the *Rich* decision either actually or implicitly overturned all existing federal case law holding that federal courts have exclusive jurisdiction over Miller Act claims.[2] However, St. Paul and North American notably never engage in an analysis of the *Rich* decision in support of this contention. St. Paul and North American fail to engage in an analysis of the *Rich* opinion precisely because this Court was not called upon in *Rich* to determine whether federal courts have exclusive jurisdiction over Miller Act claims as St. Paul and North American misleadingly suggest.

Although *Rich* is admittedly a Miller Act case, none of the parties argued that they should be permitted to litigate their Miller Act claims in a *state* forum. In fact, the facts of *Rich* do not even disclose the existence of a forum selection clause. In *Rich*, this Court determined only that a subcontractor on a government project located in California could maintain its Miller Act claim in a federal court in California despite the fact that one of several shipments of materials to the project were diverted by the

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[2] For example, at page 8 of their Brief, St. Paul and North American contend that the Tenth Circuit's conclusion in this case that the Miller Act grants federal courts exclusive jurisdiction "is contrary to *Rich*."

contractor to another government project located in South Carolina.

In *Rich*, this Court ruled that despite the existence of the single diverted shipment of materials to South Carolina, the subcontractor could maintain its entire action in federal court in California because a sufficient nexus existed with the State of California for the satisfaction of the venue requirement of the Miller Act. This Court therefore concluded that the site for performance of the original contract remained the same for Miller Act purposes. *Id.* at 125.

Examining the purpose behind the Miller Act, this Court in *Rich* additionally noted that:

> Ordinarily, a supplier of labor or materials on a private construction project can secure a mechanic's lien against the improved property under state law. But a lien cannot attach to Government property, see Illinois Surety Co. v. John Davis Co., 244 U.S. 376, 380, 375 S.Ct. 614, 616, 61 L.Ed. 1206 (1917), so suppliers on Government projects are deprived of their usual security interest. The Miller Act was intended to provide an alternative remedy to protect the rights of these suppliers.

Id. at 122. Commenting on the "alternative remedy" provided by the Miller Act, this Court later in *Rich* stated that:

> The Miller Act provides a federal cause of action, and the scope of the remedy as well as

> the substance of the rights created thereby is a matter of federal not state law.

Id. at 127. Accordingly, the concept of exclusive federal jurisdiction over Miller Act claims is entirely consistent with this Court's pronouncement in *Rich*.

St. Paul and North American additionally make no effort to explain why this Court did not see fit to overrule or disapprove of earlier federal cases holding that federal courts have exclusive jurisdiction over Miller Act claims in *Rich*. *See, e.g., United States Fidelity & Guaranty Co. v. Hendry Corp.*, 391 F.2d 13 (5th Cir.), *cert. denied*, 393 U.S. 978 (1968) and *Koppers Co. v. Continental Casualty Co.*, 337 F.2d 499 (8th Cir. 1964) (J. Blackmun).

Nothing in the opinion of the Court of Appeals herein is in conflict with the holding of this Court in *Rich*, and the *Rich* opinion provides no basis to review the decision of the Court of Appeals in this case.

II.

STATE AND FEDERAL COURTS HAVE CONSISTENTLY HELD THAT FEDERAL COURTS HAVE EXCLUSIVE JURISDICTION OVER MILLER ACT CLAIMS

Building on their misleading interpretation of this Court's decision in *Rich*, St. Paul and North American next suggest the existence of a conflict among the circuits regarding whether federal courts have exclusive jurisdiction over Miller Act claims. St. Paul and North American suggest the existence of such a conflict despite the fact that in 28 pages of briefing they are unable to cite a *single case* wherein a federal court actually concludes that state

and federal courts have concurrent jurisdiction over Miller Act claims, or wherein a Miller Act claim was actually transferred to or litigated to a final resolution in a state forum.

In contrast to lack of any relevant authority supporting the position advocated by St. Paul and North American in their Brief, federal courts have repeatedly and consistently recognized the existence of exclusive federal jurisdiction over Miller Act claims. *See United States ex rel. Bryant Electric Co. v. Aetna Casualty & Surety Co.*, 297 F.2d 665, 667 (2nd Cir. 1962) ("40 U.S.C. § 270b(b) vests exclusive jurisdiction over suits on Miller Act bonds in the federal courts. . . . "); *United States ex rel. Harvey Gulf International Marine, Inc. v. Maryland Casualty Co.*, 573 F.2d 245, 247 (5th Cir. 1978) ("jurisdiction over Miller Act claims is exclusively federal. . . . "); *Blanchard v. Terry & Wright, Inc.*, 331 F.2d 467, 469 (6th Cir.), *cert. denied*, 379 U.S. 831 (1964) ("Exclusive jurisdiction in the District Court was expressly conferred by the Miller Act."); *United States ex rel. Owens-Corning Fiberglass Corp. v. Brandt Construction Co.*, 826 F.2d 643, 645 (7th Cir. 1987), *cert. denied*, 484 U.S. 1026 (1988) ("Federal courts have unanimously read this language [40 U.S.C. § 270b(b)] as establishing that jurisdiction of Miller Act claims is *exclusively* federal.") (emphasis in original); *Koppers Co. v. Continental Casualty Co.*, 337 F.2d 499, 506 (8th Cir. 1964) (J. Blackmun) ("we have no doubt that, as between a state court, on the one hand, and a federal court, on the other, the statute is jurisdictional in character and operation and places exclusive jurisdiction over Miller Act bond suits in the federal tribunal."); *United States ex rel. General Rock and Sand Corp. v. Chuska Development Corp.*, 55 F.3d

1491, 1493 (10th Cir. 1995) (the Miller Act "affords . . . suppliers 'the right to sue on [the] payment bond for the amount . . . unpaid at the time of institution of such suit,' *id.* § 270b(a), and grants the federal district courts exclusive jurisdiction over such actions, *id.* § 270b(b).").

St. Paul and North American attempt to cast doubt on the continued vitality of some of these decisions by arguing that they pre-date the decision of this Court in *Rich*, and that this fact somehow limits the analysis employed. Included among the cases offered by St. Paul and North American to support this contention is the decision authored by Justice Blackmun while a member of the Eighth Circuit Court of Appeals in *Koppers Co. v. Continental Casualty Co.*, 337 F.2d 499 (8th Cir. 1964). However, St. Paul and North American fail to disclose that this Court was undeterred by the fact that *Koppers* pre-dated *Rich* when it unanimously cited *Koppers* in 1983 as precedent providing an example of a statute granting exclusive jurisdiction to federal courts. *See Franchise Tax Board v. Construction Laborers' Vacation Trust*, 463 U.S. 1, 26 n.27 (1983). If the decision of the Eighth Circuit Court of Appeals in *Koppers* were limited by this Court's later ruling in *Rich*, as St. Paul and North American maintain, this Court would not have unanimously relied on the *Koppers* decision in 1983 to provide an example of a case addressing a situation in which a federal statute (the Miller Act) grants exclusive jurisdiction to the federal courts.

Noticeably absent from the Petition for Certiorari of St. Paul and North American are any state cases wherein state courts have interpreted the *Rich* decision in the manner advocated by St. Paul and North American. One

would assume that if St. Paul and North American were correct, and this Court's decision in *Rich* clarified that federal courts have only concurrent (as opposed to exclusive) jurisdiction over Miller Act claims, state courts would have been receptive to Miller Act claims brought in state court after 1974 (the year of the *Rich* opinion). In fact, the exact opposite is true.

Consistent with the federal decisions noted above, state courts have repeatedly and consistently *refused* to entertain Miller Act claims filed in state court, and have determined that such claims are exclusively federal in nature. In several of these cases, these courts have specifically rejected the arguments advanced by St. Paul and North American in their Petition for Certiorari. *See Balboa Insurance Co. v. Sippial Electric Co.*, 379 So.2d 579, 581 (Ala. 1980) ("state courts have consistently held that jurisdiction for claims against a Miller Act surety rests exclusively in federal court."); *Airport Construction and Materials, Inc. v. Bivens*, 279 Ark. 161, 649 S.W.2d 830, 832 (1983) ("We agree that this section [Section 270b(b)] indicates venue, but only in the context of venue within the federal system. It appears well settled that federal jurisdiction is exclusive on any Miller Bond suit."); *American Insurance Co. v. Kinder*, 640 S.W.2d 537, 539 (Mo. Ct. App. 1982) (rejecting the contention that 28 U.S.C. § 1352 creates concurrent jurisdiction in state courts to determine Miiler Act claims); *Nationwide Electric, Inc. v. Associated Bonded Construction Co.*, 557 A.2d 1224, 1225 (R.I. 1989) (finding state court lacked jurisdiction to entertain Miller Act claim because federal courts have exclusive jurisdiction over Miller Act claims and rejecting applicability of 28 U.S.C. § 1352 because purpose of Section 1352 was to

give federal courts jurisdiction of bond actions in dispute where the requisite diversity and minimum amount in controversy were lacking); *FMI Contracting Corp. v. Federal Insurance Co.*, 829 S.W.2d 907, 908 (Tex. Civ. App. 1992) ("Exclusive jurisdiction of suits under the Miller Act lies with the United States District Court.").

Further, one of the cases relied upon by St. Paul and North American to support their argument concerning the existence of a conflict among the circuits regarding the exclusivity of federal jurisdiction over Miller Act claims, *United States ex rel. Pittsburgh Tank & Tower, Inc. v. G&C Enterprises, Inc.*, 62 F.3d 35 (1st Cir. 1995), is not even on point. In *Pittsburgh Tank*, a subcontractor on a government project brought claims against the general contractor and the Miller Act surety in the federal court for the district in which the government project at issue was located. The contractor moved to dismiss the subcontractor's claim for improper venue, relying on a forum selection clause whereby the subcontractor agreed that venue of all suits arising against the contractor would be litigated in Burlington County, New Jersey. The First Circuit Court of Appeals affirmed the District Court's decision to dismiss the subcontractor's Complaint for improper venue, holding that the parties could contractually modify the venue required by the Miller Act. However, unlike the present case, neither party in *Pittsburgh Tank* interpreted the forum selection clause at issue to require that the subcontractor's claims be pursued in state court. In fact, the First Circuit Court of Appeals specifically noted that:

> although the forum selection clause here refers to a county that apparently contains no federal

> court, both parties have treated the clause as providing for venue in the federal district court for the district of New Jersey.

Id. at 36. Accordingly, the First Circuit Court of Appeals in *Pittsburgh Tank* was not called upon to determine whether federal courts have exclusive jurisdiction over Miller Act claims as St. Paul and North American misleadingly claim. Rather, because both parties in that case agreed that the subcontractor's claims could be pursued in federal district court in New Jersey, the issue was only whether the case could be transferred from one federal district court to another. The citation of this case by St. Paul and North American as somehow supportive of their Petition for Certiorari is therefore wholly without merit.[3]

The only other citation of authority arguably favorable to the position advocated by St. Paul and North American is the decision of the Eighth Circuit Court of Appeals in *FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230 (8th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3503 (U.S. Dec. 4, 1995) (No. 95-1102).[4] However, the rulings of the Eighth Circuit Court of Appeals in *Carlow* are of little

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[3] Similarly, the Fifth Circuit Court of Appeals in *In re Fireman's Fund Ins. Co.*, 588 F.2d 93 (5th Cir. 1979), cited at pages 10 and 11 of Petitioners' Brief, did not concern whether federal courts have exclusive jurisdiction over Miller Act claims. Again, the transfer at issue in *Fireman's Fund* was from the United States District Court for the Eastern District of Louisiana to the United States District Court for the District of New Jersey.

[4] The Petition for Certiorari filed in the *Carlow* case raises issues unrelated to those raised by St. Paul and North American herein.

application outside the particular facts and circumstances of that case.

In *Carlow*, FGS Constructors, Inc. was hired as a subcontractor to perform mechanical and structural work on a dam located on the Pine Ridge Indian Reservation. After various problems arose during the course of the project, FGS brought a diversity action in federal district court against the general contractor for breach of contract, against the Miller Act sureties for enforcement of the Miller Act bonds, and against the federal government for negligence. The district court dismissed the contract action against the general contractor, and determined that due to comity concerns and the sovereignty of the Oglala Sioux Tribe, the Tribe's tribal courts should be given the first opportunity to address FGS' claims against the general contractor and its sureties. The district court additionally ruled that the general contractor and its sureties had waived the Miller Act venue requirement by the language of a dispute resolution clause contained in the subcontract with FGS.

The quotation from the *Carlow* opinion relied upon by St. Paul and North American to support their argument is taken from that portion of the decision of the Eighth Circuit dealing with the dismissal of FGS' claims against the general contractor and the Miller Act sureties. Again, the district court grounded its dismissal of these claims on comity concerns and on FGS' failure to first exhaust any tribal court remedies FGS had against the general contractor and the sureties. In this factual setting, the Eighth Circuit rejected the district court's determination that FGS must first exhaust its remedies in tribal court. The Eighth Circuit Court of Appeals determined

that the contracting parties specifically agreed that FGS could sue either in federal district court in South Dakota, or in tribal court. The Eighth Circuit determined that the specific forum selection clause at issue revealed that the Oglala Sioux Tribe had agreed in advance that disputes need not be litigated in tribal court. Accordingly, the Eighth Circuit determined that there was no significant comity reason to defer the Miller Act litigation first to the tribal court.

Although the Eighth Circuit Court of Appeals agreed with the district court "that a federal court does not have exclusive jurisdiction over *these* Miller Act claims. . . . ", *id.* at 1233 (emphasis added), it reversed the decision of the district court. Concluding that the federal district court was "the usual forum for such claims and has a significant interest in determining the merits of the action," the Eighth Circuit remanded FGS' Miller Act claims for trial in the federal forum.

The Eighth Circuit, in *Carlow*, did not overrule, much less mention, its earlier case of *Koppers Co. v. Continental Casualty Co.*, 337 F.2d 499 (8th Cir. 1964), holding that federal courts have exclusive jurisdiction over Miller Act claims. The Eighth Circuit therefore obviously intended *Carlow* to be limited to the peculiar facts presented. In fact, the Eighth Circuit Court of Appeals recognized the limited nature of its holding later in the opinion when it stated:

> While the Miller Act venue requirement, requiring suits to be brought in the district where the contract was to be performed, served to benefit defendants and could be waived by defendants, *these rules and requirements have no relevance to*

> *this issue*. No provision in the agreement gave these defendants the right to override a plaintiff's choice of forum under the forum selection clause.

Carlow, 64 F.3d at 1233 (emphasis added).

Further, there does not appear to have been any attempt, as here, to deprive FGS of its right to have its Miller Act claims eventually litigated in federal court. The district court in *Carlow* dismissed FGS' federal claims due to its failure to first *exhaust* any available tribal court remedies. Presumably, had the district court's order been permitted to stand, FGS could have *returned to* federal court to adjudicate its Miller Act claims following the exhaustion of its tribal court remedies. Conversely, St. Paul and North American attempted to enforce a forum selection clause that they themselves have interpreted as permanently depriving B&D of its ability to bring claims in federal court either in Oklahoma or in Texas.

There is absolutely no reason for this Court to grant certiorari in this case. The Tenth Circuit Court of Appeals correctly determined that federal courts have exclusive jurisdiction over Miller Act claims, and its ruling in this regard is in accord with both state and federal case precedent spanning over thirty years. Further, this case does not merit a grant of certiorari given the fact that if St. Paul and North American wish to litigate future Miller Act claims in Texas brought by subcontractors on government projects located throughout the United States, they can easily revise their subcontract form to provide for exclusive jurisdiction in the United States District Court

for the Southern District of Texas. Accordingly, the contention of St. Paul and North American that this case involves important issues of federal law are overstated. The decision of the Tenth Circuit Court of Appeals in this case can easily be avoided through a simple contractual modification, and this case does not merit further review by this Court.

III.

28 U.S.C. § 1352 DOES NOT PROVIDE CONCURRENT STATE AND FEDERAL JURISDICTION OVER MILLER ACT CLAIMS

St. Paul and North American rest part of their argument concerning the existence of concurrent state and federal jurisdiction over Miller Act claims on 28 U.S.C. § 1352. This statute was enacted over 47 years ago. Since that time, it has never been used in the manner suggested by St. Paul and North American. In fact, St. Paul and North American fail to disclose that Justice Blackmun, writing for the Eighth Circuit Court of Appeals in *Koppers Co., Inc. v. Continental Casualty Co.*, 337 F.2d 499, 506 (8th Cir. 1964), specifically rejected the use of Section 1352 to create concurrent state and federal jurisdiction over Miller Act claims. In response to an identical argument raised in the *Koppers* case, Justice Blackmun deemed the argument "not persuasive":

> The purpose of § 1352 was to give federal courts jurisdiction of bond actions where, absent the necessary diversity and minimum amount in controversy, it otherwise did not exist. (Citation omitted.) It was not to provide state court jurisdiction over bond actions otherwise restricted to

> federal tribunals. Minneapolis-Honeywell Regulator Co. v. Terminal Constr. Corp., supra, p. 563 of 197 A.2d. See Revisor's note to 28 U.S.C.A. § 1352.

Koppers, 337 F.2d at 506.

Similarly, state courts which have considered this issue have uniformly rejected the application of 28 U.S.C. § 1352 as a basis for concurrent state and federal jurisdiction over Miller Act claims. *See Nationwide Electric, Inc. v. Associated Bonded Construction Co.*, 557 A.2d 1224, 1225 (R.I. 1989) (rejecting argument that Section 1352 provides concurrent state and federal jurisdiction over Miller Act claims); *American Ins. Co. v. Kinder*, 640 S.W.2d 537, 539 (Mo. Ct. App. 1982) (rejecting as unsound argument that Section 1352 results in jurisdiction in state courts for suits on Miller Act bonds).

The suggestion by St. Paul and North American that Congress intended to provide for concurrent state and federal jurisdiction over Miller Act claims through the enactment of 28 U.S.C. § 1352 is not only inaccurate, but has been expressly rejected by state and federal courts alike. Thus, this argument similarly fails to provide any basis for a grant of certiorari herein.

IV.

THE TENTH CIRCUIT'S INTERPRETATION OF THE FORUM SELECTION CLAUSE CONTAINED IN THE SUBCONTRACT IS OF NO IMPORTANCE BEYOND THE FACTS AND CIRCUMSTANCES OF THIS CASE

St. Paul and North American finally complain about the interpretation given the forum selection clause contained in the Subcontract by the Tenth Circuit Court of Appeals. St. Paul and North American fail to explain why their arguments in this regard serve as a basis for this Court to grant their Petition for Certiorari. In fact, this portion of their Brief actually skips this step, and argues the merits of their appeal, urging that the interpretation employed by the Tenth Circuit Court of Appeals "requires reversal."

Apart from the procedural infirmities of this portion of their Brief, St. Paul and North American fail to disclose that the interpretation given by the Tenth Circuit to the forum selection clause contained in the Subcontract was that urged by St. Paul and North American to be applied. St. Paul and North American, and not B&D, argued that the forum selection clause contained in the Subcontract limited B&D to the prosecution of claims against North American in the state court in Bexar County, Texas. St. Paul and North American therefore find fault with the Tenth Circuit's interpretation of the forum selection clause in a manner consistent with that argued by St. Paul and North American. Accordingly, St. Paul and North American are arguing that the decision of the Tenth Circuit Court of Appeals should be reversed because the

Tenth Circuit used the interpretation of the forum selection clause that St. Paul and North American argued should be applied.

Moreover, the offer of St. Paul and North American to permit the Tenth Circuit to rewrite the forum selection clause contained in the Subcontract to attempt to cure its infirmity by allowing B&D to prosecute its claims in the United States District Court for the Southern District of Texas did not occur until after St. Paul and North American became aware of the potential jurisdictional problems with the forum selection clause actually drafted by North American and included in the Subcontract. The Tenth Circuit Court of Appeals properly concluded that neither the Court of Appeals, nor North American and St. Paul should be permitted to rewrite the forum selection clause to benefit St. Paul and North American by curing it of its obvious jurisdictional infirmity, and that the forum selection clause was therefore void and unenforceable.

There is nothing about the Tenth Circuit Court of Appeals' interpretation or construction of the forum selection clause at issue in this case that conflicts with existing federal jurisprudence including the *Rich* case, or that merits further review by this Court. Accordingly, the Petition for Certiorari of St. Paul and North American should be denied on this basis as well.

CONCLUSION

This case does not merit further time or attention by this Court. Accordingly, the Petition should be denied.

DATED this 26th day of March, 1996.

Respectfully submitted,

KURT M. RUPERT, OBA #11982
Counsel of Record
KENT FRATES
HARTZOG CONGER & CASON
1600 Bank of Oklahoma Plaza
201 Robert S. Kerr
Oklahoma City, Oklahoma 73102
(405) 235-7000
FAX: (405) 235-7329

Attorneys for Respondent
B&D Mechanical Contractors, Inc.